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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 905

UNITED STATES OF AMERICA, *Petitioner*

v.

NATIONAL PRESTO INDUSTRIES, INC.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Appendix to the Petition) is reported at 338 F. 2d 99. The findings of fact by the Court of Claims (App. 35)[1] are as yet unreported.

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[1] "App." references are to the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether a contractor to supply artillery shells to the Government to be manufactured by a new and untried process with equipment provided by the Government is entitled to relief where, as the Court of Claims found, the parties entered into the contract under a mutual mistake as to an essential fact—the need for turning equipment as part of the manufacturing process, without which the shells could not be made.

STATEMENT

The pertinent facts are fully set forth in the opinion of the Court of Claims (App. 15-18).

The facts, which are undisputed and are not challenged by petitioner, are:

During the Korean war a very serious ammunition shortage developed, particularly in 105-millimeter artillery shells. In late 1952 the Ordnance Department asked a number of experienced shell manufacturers, including respondent, to submit proposals for the large scale production of such shells (Fdgs. 3 & 4, App. 36). The established procedure in effect at the time for obtaining production of items for which there was no commercial demand was by means of two contracts, a supply contract and a facilities contract. The supply contract contained the agreement of the contractor to supply the end item; and the facilities contract contained the agreement of the Government to provide the contractor with the equipment necessary to make it.

Respondent submitted a proposal for the establishment of seven shell lines at its Eau Claire, Wisconsin plant, each capable of producing shells at the rate of 60,000 per month on a one-shift basis (Fdg. 6, App. 36-38). The shells were to be produced by the conventional hot forge method—a method requiring the shells to be heated twice, cooled twice, roughed-turned once, then turned again (Fdg. 11, App. 41-42). In the process approximately one-third of the weight of the original billet goes to scrap (Fdg. 11, App. 42).

While the proposals submitted by respondent and other manufacturers were under consideration, a new method of producing shells was being studied (App. 15). This was known as the hot cup-cold draw process (App. 15). Under this method the billet is heated only once, punched and pierced, then drawn to shape while cold (Fdg. 12, App. 42). The big advantage of this process over the conventional process is that it requires much less steel, always in short supply in time of war (Fdgs. 11 & 12, App. 41-43).

At the time it submitted its proposal respondent was producing 105-millimeter shells for Ordnance by the conventional method at its Menomonie, Wisconsin plant (App. 16). When the change to the hot cup-cold draw process was proposed, respondent indicated its interest (App. 16). While the precise method to be used was still undecided, Ordnance decided to award the contract to respondent (Fdg. 9, App. 41). Two letter contracts were entered into in June 1953, one for establishing the production lines at respondent's Eau Claire plant and the other for the production of a million shells at that plant at a fixed price per shell (Fdg. 13, App. 43). These contracts were based on the use of the conventional method of manufacture, but soon

after they were executed it was agreed that the hot cup-cold draw process would be used (App. 16). Though a limited quantity of shells had been produced by the hot cup-cold draw process at another plant (Tokheim), the process was new and untried for mass production (Fdg. 15, App. 44). The letter contracts provided that after production of the million shells had been completed, respondent was to maintain the plant in stand-by condition for the Army's use (App. 16).

Under the letter contracts respondent was to acquire the machinery and equipment required, after obtaining the written approval of the contracting officer; and the Government was to pay for it (App. 16; Fdg. 13, App. 43). Title to all property so acquired was to vest in the Government (Fdg. 27, App. 53).

The summer and early fall of 1953 were devoted to a study of the type of equipment that would be most effective for the new process (App. 16, Fdg. 15, App. 44). The multi-line facility to be established at respondent's plant was to be one of the largest in the country and it was important to both the Government and the respondent that it be as efficient as possible (Fdg. 15, App. 44). Ordnance did not expect respondent to duplicate the equipment or the exact process in use at the Tokheim plant; and the plan proposed by respondent (and accepted by petitioner) made a number of significant changes from the Tokheim equipment and process (Fdg. 15, App. 44).

On November 10, 1953, the parties met to consider the equipment schedule to be incorporated in the formal facilities contract which was to supersede the letter contract relating to facilities (App. 16). Respondent

felt that the equipment schedule should include 24 plunge grinders to eliminate eccentricity in the shells when they came out of the hot forge and to remove surface imperfections (App. 16; Fdgs. 19 & 20, App. 45-46). Colonel Haskell, the authorized representative of Ordinance, took the position that an operation for this purpose was not necessary; and informed respondent that he would not approve a facilities schedule which included plunge grinders (App. 16; Fdg. 20, App. 46). The Court of Claims held that respondent acquiesced in this position (App. 21).

Shortly after the November 10, 1953, meeting respondent submitted a new equipment schedule omitting the grinders (App. 16-17). Formal contracts were executed in early December of 1953 (Fdg. 26, App. 51). Production of the shells was to commence in July 1954 (App. 17).

Respondent then began the detailed process leading to the acquisition and installation of the necessary equipment (App. 17). Its engineering studies revealed that for the most part the equipment was not available and had to be specially designed (Fdg. 30, App. 59-60). In March 1954, before such engineering studies were completed, Ordnance advised respondent that procurement of 105-millimeter shells was being drastically curtailed and directed it to terminate all production at Eau Claire and Menomonie scheduled for delivery after April 30, 1954 (App. 17). Following negotiations for a decrease rather than elimination of production, Ordnance rescinded its notice of termination and, on June 30, 1954, the parties entered into a supplemental agreement providing that respondent should produce a new total of 1,100,000 shells in place of the amounts to be produced at both Eau Claire and Menomonie

under the earlier contracts (App. 17). A new fixed price per shell was agreed upon and respondent was given the right to manufacture the shells at either Eau Claire or Menomonie as it wished (App. 17). Production at Menomonie was to be by the conventional hot forge method and production at Eau Claire was to be by the new hot cup-cold draw method (App. 17).

Delays were encountered in obtaining the equipment needed for the Eau Claire plant and preliminary operations did not get under way there until the summer of 1955 (App. 17). In the meantime shells were being shipped from the Menomonie plant (App. 17). By the end of August 1955, over 800,000 shells had been shipped from Menomonie (App. 17). At this rate it appeared that the entire 1,100,000 shells would be produced at Menomonie by the conventional process before the new method could be tested out at Eau Claire (App. 17). Ordnance was anxious to test the hot cup-cold draw process (App. 17). Although respondent had the right under its contract to ship all the shells from its Menomonie plant, it agreed to phase out production there so that some 180,000 shells would be left to be manufactured at Eau Claire by the hot cup-cold draw process (App. 18).

Production got under way on a small scale at Eau Claire in September 1955 and a comparatively few shells were turned out satisfactorily without the use of turning equipment (App. 18). During this period the tempo of production was markedly less than under conditions of mass production (Fdg. 38, App. 71). When respondent stepped up its production rate, it began to experience serious difficulty with the concentricity of the shells (Fdg. 41, App. 72). As time went on it became doubtful that good shells could be made

without some form of turning equipment (App. 18); but respondent attempted over a period of time, with the Government's acquiescence and approval, to overcome the problem without turning equipment (Fdg. 41, App. 72; Fdg. 43, App. 73). It did not succeed. By the end of April 1956, it was definitely determined by respondent and by Ordnance that satisfactory shells could not be produced without a turning operation; and respondent was authorized to purchase a number of new lathes to perform this operation (App. 18). Ordnance agreed that such equipment was "absolutely essential" to the accomplishment of efficient and economical production of shells under the hot cup-cold draw process (Fdg. 44, App. 74). The new lathes, which cost in excess of $1,200,000, were not delivered to respondent's plant until after production under the shell supply contract was completed (Fdg. 48, App. 74-75).

Meanwhile respondent, with the consent of Ordnance, transferred some older lathes from the Menomonie plant to perform the turning operation (App. 18). As soon as the Menomonie lathes were installed at Eau Claire, production increased sharply (Fdg. 46, App. 74). Production of the 180,000 shells at Eau Claire was not completed until September of 1956 (App. 18). Respondent received payment at the contract price for the shells produced at Eau Claire (App. 18). It sustained a loss of $743,099.68 on the Eau Claire operation (Fdgs. 57, 58, 59, 60, App. 76). It made a profit of $111,578.22 from the production at Menomonie (Fdg. 56, App. 76).

On the basis of the experience gained at respondent's plant on the contracts involved in this case, all new government-owned or government-financed shell lines

are set up and will be set up on the hot cup-cold draw process (Fdg. 51, App. 75). All of them have turning equipment in the form of lathes (Fdg. 51, App. 75). The Court of Claims found that this new process requires turning equipment (i.e., lathes or comparable devices) for efficient and economical production on a mass basis (Fdg. 51, App. 75).

The Court of Claims also made the following finding which is directly pertinent to the issue here presented (Fdg. 53, App. 75-76):

> At the time of the negotiations and the execution of the contracts in 1953 both parties were mistaken (excusably and in good faith) as to the actual need for turning equipment (i.e., lathes or comparable machines) in the efficient and economical manufacture of these shells by the hot cup-cold draw process on a mass production basis. Both parties thought that such equipment would not be needed and both were excusably ignorant (in good faith) of the process of trial and error, and the period of time, necessary to determine whether such turning equipment was or was not necessary. The parties were not satisfied as to the need for such equipment until the end of April 1956.

The Court concluded that in the circumstances of this case the loss attributable to the mistake over the turning equipment should be divided equally between the parties (App. 32-34).

ARGUMENT

The decision of the court below is correct. Moreover, no conflict of decisions is shown. Nor is the case one of great importance. The case accordingly does not warrant review by this Court.

1. The decision below is clearly correct.

The Court of Claims found "there was a definite mutual mistake as to a very material fact—an innocent mistake which apparently led the contractor, without fault, to a large loss" (App. 25).[2]

The mistake was not, as suggested in the petition, "as to the extent of the difficulties and expense of performance." The mistake was as to whether it was possible to make shells on a mass production basis by means of the hot cup-cold draw process without turning equipment. The court below found that at the time the contracts were executed both parties thought that turning equipment would not be needed (Fdg. 53, App. 75). It further found that they were both, excusably and in good faith, wrong: that the "new process requires turning equipment (i.e., lathes or comparable devices) for efficient and economical production on a mass basis" (Fdg. 51, App. 75).

As summarized by the court below:

> The mutual mistake was this: It was important to the Government to create stand-by facilities using the hot cup-cold draw method of making shells. Both parties hoped to make the shells under this process without any turning equipment, so as to diminish the wastage of steel to the great-

[2] This statement was qualified by "apparently" only because "it has not yet been decided how much of the claimed loss was attributable to the mistake." (App. 25, fn. 9)

> est extent possible. [Respondent's] trials over a considerable period demonstrated, however, that this new method could not efficiently be used for mass production without one turning step at which some excess steel was removed from the shell. The main objective of the new method was to save much of the scrap steel resulting from the conventional hot forge process. That end was still reached, but not as completely as initially expected. Much steel was saved, but less than hoped. Some turning was still necessary. This critical fact the Government certainly did not know at the time of the negotiations and the execution of the contracts with [respondent]. The [petitioner] was unaware, also, that it would take much time and effort to discover the truth. (App. 25)
>
> . . . . . we conclude, from the history of the contract as well as [petitioner's] own ultimate support of the lathes, that the parties were right when they ultimately decided that the process would not work properly for mass production without turning equipment. In short, the parties reasonably labored, for most of the contract period, under a mutual mistake as to a most material set of facts. And that mistake was not understood until the [respondent] had tried, with [petitioner's] approval, for quite a while—and apparently with the expenditure of considerable money—to make the shells without turning equipment. (App. 26-27)

The findings referred to above are not challenged by petitioner. Shells simply could not be made on a mass production basis without turning equipment. And mass production was what the Government was interested in. The Eau Claire plant was designed to turn out 360,000 shells per month on a one-shift basis or more than a million shells per month when operated around the clock. It was to be maintained on a stand-

by basis, ready to be activated should the need arise. Turning out a few shells on a custom-built basis was not at all what the parties had in mind. Indeed, if delivery of shells at the price fixed in the contract had been the Government's primary objective, it could have obtained delivery of the entire 1,100,000 shells from respondent's Menomonie plant. Respondent would have ended up with a profit but the hot cup-cold draw process would have remained untested. Although respondent could have stood on its legal rights and insisted on supplying all the shells from Menomonie, it elected not to do so in order to help the Government determine whether the new method of shell manufacture would work. It is apparent that respondent thus erred, an error from which the Government benefitted and from which respondent sustained a very substantial loss.

Having found the facts as indicated above, the court below correctly entered judgment for respondent in accordance with the settled rule that where there is "a mutual mistake as to a material fact relating to the contract" the court will, "in effect, reform the contract by putting [the parties] as nearly as possible in the position they would have occupied but for the mistake." *Virginia Engineering Co.* v. *United States*, 101 Ct. Cl. 516, 532.

Petitioner denies that this is the rule. It would have the court apply instead the old common law rule, exemplified by such cases as *Paradine* v. *Jane* (1647) Aleyn 26, 82 Eng. Reprint 897, to the effect that a party will be held to the letter of his contract regardless of mistake, impossibility of performance, or other mitigating circumstances. But that rule has long since

been tempered by the requirements of equity and justice.

As long ago as *Hunt* v. *Rousmaniere*, 1 Pet. 1 (1828), this Court said (at p. 13):

> There are certain principles of equity applicable to this question, which, as general principles, we hold it to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement . . . . *So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a Court of Equity will, in general, grant relief, according to the nature of the particular case in which it is sought.* (Emphasis added)

Again in *Hearne* v. *Marine Insurance Company*, 20 Wall. 488 (1874) the Court said (at p. 490):

> The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement, as reduced to writing, omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

See also *Moffett, Hodgkins & Clarke Co.* v. *Rochester*, 178 U.S. 373, 384-385.[3]

Any question as to the existence in the instant case of a mutual mistake as to a most material fact is laid to rest by the facts as found and exposited by the court below. (Fdg. 53; App. 75, 25)

Nor, having found such a mistake, is there anything novel, as petitioner suggests, in the court's having given appropriate relief to respondent. For at least the past 60 years it has been held that the Court of Claims has the power to reform a contract in a case of mutual mistake of fact and give a money judgment accordingly. See *District of Columbia* v. *Barnes*, 197 U.S. 146 (1905); *United States* v. *Milliken Imprinting Co.* 202 U.S. 168 (1906); *Cramp* v. *United States*, 239 U.S. 221 (1915); *Ackerlind* v. *United States*, 240 U.S. 531 (1916).

And the Court of Claims has used this power judiciously and sparingly. Since the Court of Claims has

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[3] Petitioner's reliance on the *Hunt*, *Hearne*, and *Moffett* cases, *supra*, as well as other decisions of this Court, in support of its position (Pet. 12-13), is misplaced. In each of these cases, the Court specifically recognized the equitable principle of granting relief where there was a mistake as to, or ignorance of, a material fact. In *Hunt* the Court merely found total absence of a mistake. In *Hearne* likewise there was no mistake, but an attempt to vary contract terms by a claimed usage, and, at that, a usage which the Court found not sustained by the evidence. 20 Wall. at 493. In *Moffett* the principle of reformation for mistake as expressed in *Hearne* was quoted by the Court and relief was given to the complainant. *Hedges* v. *Dixon County*, 150 U.S. 182, fully recognized the right to relief in the event of mistake, but the Court found no mistake; rather, a void contract for want of the County's constitutional authority to make it. 150 U.S. at 192. Nor does *Manufacturers' Finance Co.* v. *McKey*, 294 U.S. 442, give any more support to petitioner.

no power to grant general equitable relief, only to award money judgments, the term "reformation of a contract" is used in that court to describe a means of arriving at a result that is fair and equitable and giving a money judgment accordingly. Thus, in *Harrison Engineering and Construction Corp.* v. *United States,* 107 Ct. Cl. 205, 208 (1946), the court said:

> The invention of the [reformation] remedy by equity was a recognition that legal documents, however formal, must, in some circumstances, give way to fairness and justice. One of the circumstances in which the doctrine applies is when the parties to the document are both mistaken as to some fact, and because of their mistake, they make an agreement which they would not have made had they not been so mistaken.

See *also Heid Brothers* v. *United States,* 63 Ct. Cl. 392; *Pocono Pines Hotels Co.* v. *United States,* 73 Ct. Cl. 447, 482; *Virginia Engineering Co.* v. *United States,* 101 Ct. Cl. 516, 532-33; *Peter Kiewit Sons' Co.* v. *United States,* 109 Ct. Cl. 517, 522-23; *Jones & Sears, Inc.* v. *United States,* 158 Ct. Cl. 162, 172-3).

Indeed, in *Sutcliffe Storage & Warehouse Co.* v. *United States,* 125 Ct. Cl. 297, the Government contended that recovery should be denied on the ground that the contract was entered into under a mutual mistake of fact. This defense was sustained by the court over an objection by the plaintiff very similar to that urged by the Government here. The court said (at p. 304):

> The granting by this court of such relief in proper cases, to either party, promotes substantial justice according to the merits of the case.

That is what the court below did here.

Its decision is not novel. The only novelty is in the measure of damages which the court adopted. In earlier mistake of fact cases, it had been held that a plaintiff was entitled to recover the entire loss attributable to the mistake. Here the court held that respondent was entitled to recover only one-half of the loss (App. 34). If there is basis for complaint as to this, it is respondent's complaint, not petitioner's. In any event, we understand the court's 50-50 division of the loss to constitute its expression of a molding of the relief to attain a fair result. See App. 33.

The decision of the court below is in line with the uniform rulings of this Court and other courts in mistake of fact cases, whether arising in government contract or other situations, and is clearly correct.

2. The decision below is not in conflict with the decisions of this Court or of any other. It applies established principles of contract law to a particular factual situation. It is in keeping with the very purpose for which the Court of Claims was created, which is to do justice between the parties.

3. Nor is the case one of great importance. Petitioner talks about the Government's billions of dollars of contracts and implies that the doctrine of mutual mistake will wreck the whole concept of fixed price contracts. This *in terrorem* argument is wholly divorced from reality. As we have shown above, mutual mistake of fact has long been recognized as a ground for relief in government as well as in other contract cases. This does not appear to have played havoc with the Government's contracting policies or practices or with the public treasury.

In any event, for at least the past quarter century the Government has annually entered into billions of

dollars of contracts. Only a comparative handful have been found by the courts to have been entered into as a result of mutual mistakes of fact. This is not because the doctrine of mutual mistake was unknown in the law; on the contrary, as we have shown, it has been an accepted principle of contract law since long before the Court of Claims was created. The reason for the dearth of cases is that few plaintiffs have been able to meet the rigorous requirements laid down by the courts as prerequisites to the application of the doctrine. As carefully circumscribed by the court below in this case, it will not be any easier in the future.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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